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IN THE

Supreme Court of the United States

October Term 1976

No. 76-1144

MINNESOTA CIVIL LIBERTIES UNION, ET AL.,
Plaintiffs/Appellants,

vs.

HOWARD CASMEY, Commissioner of Education of
the State of Minnesota, et al.,
Defendants/Respondents.

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, Appellees respectfully move that the appeal herein be dismissed or, in the alternative, that the judgment of the United States District Court for the District of Minnesota be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

BRIEF IN SUPPORT OF MOTION CITATION TO OPINION BELOW

The opinion of the District Court has not been officially reported. A copy thereof is set forth in the appendix to appellants' Jurisdictional Statement at A-1 to A-16.

QUESTION PRESENTED

Have appellants raised a substantial federal question as to the constitutional validity of Minn. Laws 1975, ch. 396 which provides for the loan of secular textbooks and other instructional materials to students in non-public schools?

I.

STATEMENT

This is a direct appeal from a judgment, entered on November 30, 1976, of a three-judge district court convened pursuant to 28 U.S.C. § 2284 (1965). By its decision, the District Court rejected appellants' claim that Minn. Laws 1975, ch. 396¹ violates the establishment clause of the first and fourteenth amendments of the United States Constitution.

The Act was passed by the Minnesota Legislature in 1975 and became effective on July 1, 1975. The stated policy underlying the Act is to

. . . provide for distribution of educational aids such as auxiliary services, instruction materials and equipment

¹ The text of Minn. Laws 1975, ch. 396, which is codified as Minn. Stat §§ 123.931-123.937 (1976) is set forth in the appendix to appellants' Jurisdictional Statement at A-19 to A-25. Hereinafter it is referred to as "Chapter 396" or the "Act."

so that every school child in the state will share equitably in education benefits and therefore assure all Minnesota students and their parents freedom of choice in education. Minn. Laws 1975, ch. 396 § 1.

The three operational sections of the Act (sections 3-5) direct the State Board of Education to promulgate rules to implement the Act. As of this date, only rules implementing the section² which requires local public school districts to provide or loan instructional materials³ to non-public school pupils have been promulgated. The State Board has not promulgated rules relating to the sections of the Act which would provide equipment or auxiliary services to nonpublic school pupils. See chapter 396 §§ 4 and 5.

The Act further requires the Commissioner of Education to allot to each school district its entitlement to State appropriated funds under the Act. Chapter 396, § 3. In determining this allotment, the cost per pupil unit of materials provided to non-public pupils cannot exceed the statewide average cost per pupil unit spent on the same materials by the public school systems in the state. *Id.*

² Minn. Reg. EDU 740-744, which are appended hereto at A-1 to A-5. It should be noted that appellants have appended a set of rules and regulations to their Jurisdictional Statement that were not adopted by the State Board of Education.

³ "Instructional materials" are defined in section 2, subdivision 1 of the Act to include ". . . only such secular, neutral and non-ideological instructional materials . . ." as are available or normally provided to Minnesota public school students. Such materials are divided into the categories of "textbooks," "school library and audiovisual materials," and "instruction supplies".

II.

ARGUMENT

In their Jurisdictional Statement, as in the District Court below, appellants have attacked Chapter 396 on almost every conceivable constitutional ground. Their arguments, however, are either plainly unmeritorious or raise no issue which has not been previously determined by this Court. Plenary consideration of this appeal is unwarranted in view of the unsubstantiality of the issues raised by appellants.

A. Introduction

Appellees respectfully submit that Chapter 396 is valid under the now familiar three-part test applied by this Court in several recent establishment clause cases. See *e.g.*, *Committee For Public Education And Religious Liberty vs. Nyquist*, 413 U.S. 756, 772-773 (1973) (hereinafter "*PEARL v. Nyquist*"); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). *First*. Does the Act have a secular legislative purpose? See *Epperson vs. Arkansas*, 393 U.S. 97 (1968). *Second*. Does the Act have a "primary effect" that neither enhances nor inhibits religion? See *School District of Abington Township vs. Schempp*, 374 U.S. 203 (1963). *Third*. Does the Act and its administration avoid excessive government entanglement with religion? See *Walz v. Tax Commissioner*, 397 U.S. 664 (1970).

In applying the above test, it must be remembered that appellants must also overcome the strong presumption of constitutionality that is afforded state statutes. As this Court explained in *Schilb v. Kuebel*, 404 U.S. 357, 364 (1971), federal courts should set aside state legislative acts only if no conceivable grounds can be found to justify them.

B. The Minnesota act has a secular legislative purpose.

The stated purpose of the Act, as enunciated in Chapter 396 § 1, is to provide equal education benefits to all school children in Minnesota and to assure all Minnesota students and their parents freedom of choice in education. Appellants have conceded that the Act is intended to serve an adequately secular purpose and, therefore, that issue is not presently before this Court. See Memorandum Opinion at A-8 of appellants' Jurisdictional Statement.

C. The primary effect of the act neither advances nor inhibits religion.

This Court in prior establishment clause cases has set forth the following standards for determining whether the primary effect of a statute is impermissibly to aid in the establishment of religion:

1. Does the aid go directly to the non-public school, instead of to the non-public school pupils or to their parents? *PEARL v. Nyquist*, 413 U.S. 756, 781 (1973).
2. Is the aid specifically directed to a special class of non-public beneficiaries, or does the aid go to all school children, both public and non-public? *Meek v. Pittenger*, 421 U.S. 349, 362, n. 12 (1975); see *PEARL v. Nyquist*, *supra*, 413 U.S. at 782, n. 38; *Sloan v. Lemon*, 413 U.S. 825, 832 (1973).
3. Has the aid been restricted to the secular portion of the non-public schools function? *Tilton v. Richardson*, 403 U.S. 672, 673-680 (1971); see *PEARL v. Nyquist*, *supra*, 413 U.S. at 775.

When measured against these standards, it becomes manifestly clear that the "primary effect" of the Act is to provide

secular education to non-public school pupils and not to directly advance or aid the establishment of religion.

1. *The Act provides that state aid is given to non-public school pupils rather than to the non-public schools themselves.*

The fact that aid directly benefits parents and pupils, rather than benefiting the non-public schools, is an important factor in favor of the constitutionality of a statute. *Board of Education vs. Allen*, 392 U.S. 236, 243 (1968); *PEARL v. Nyquist*, *supra*, 413 U.S. at 781-783; *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971); *Walz v. Tax Commissioner*, 397 U.S. 664, 675 (1970). The Act has been carefully structured to ensure that state aid is given to non-public school children, rather than to the non-public school itself. In addition, the rules adopted by the Minnesota State Board of Education require each non-public school pupil to file an application if he wishes to participate in the program.⁴ A non-public school on its own cannot file an application on behalf of its pupils. In fact, in numerous instances, some non-public school children within a particular non-public school have applied for and are participating in the program while other children within the same school are not participating.⁵ Thus, the recipient of aid under the Act is clearly the child or parent, rather than the school.

In support of their claim that the aid under the Act goes to the schools and not to the pupils, appellants have urged an erroneous interpretation of the "child benefit theory".⁶ In this

⁴ Minn. Reg. Edu 743 at A-3.

⁵ Affidavit of Rosemary A. Sommerville, paragraph 2(c) which was appended to Defendant State of Minnesota's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion For a Preliminary Injunction And in Support of Defendants' Motion to Dismiss the Organizational Plaintiffs, dated August 20, 1976.

⁶ Appellants' Jurisdictional Statement at 13-14, and 21.

regard, appellants allege that in the past the schools, and not the pupils, have supplied instructional materials and supplementary textbooks such as workbooks. Therefore, appellants contend that the aid in question is directed to the school rather than to the pupils.

This argument, however, must be rejected for at least two reasons. First, there are no facts in the record which support the allegation that the pupils have not supplied such materials in the past. More importantly, the distinction which appellants seek to draw is without constitutional significance. It has long been the rule that neutral, nonideological aid may be channeled to the secular educational functions of parochial schools without providing direct aid to the religious function of those schools. Such aid is constitutionally permissible even though the availability of the aid may serve indirectly and incidentally to promote the religious function of certain schools by rendering it more likely that children would attend parochial schools or by freeing the budgets of those schools for use in nonsecular areas. *PEARL vs. Nyquist*, *supra*, 413 U.S. at 775; see *Tilton v. Richardson*, *supra*, 403 U.S. at 679; *Board of Education v. Allen*, *supra*, 392 U.S. at 243-244; *Everson v. Board of Education*, 330 U.S. 1, 16-17 (1947).

The type of aid provided by Chapter 396 is no different than the type of aid sustained in *Everson v. Board of Education*, *supra*. It is highly unlikely that the non-public pupils in *Everson* paid for the bus transportation in a more direct fashion than the non-public pupils paid for instructional materials and supplementary textbooks in Minnesota prior to the passage of the Act. In the instant matter, as in *Everson*, the pupils either paid for the materials directly or did so indirectly through tuition payments. The distinction that must be drawn is that the type of aid authorized by Chapter 396 § 3, is not

in the nature of a capital improvement or equipment to the school which would benefit the school itself more directly than the individual pupils. Instead, the type of assistance authorized by the Act is directed to the pupils requesting the aid and is clearly designed to benefit individual pupils rather than the non-public schools which they attend.

Accordingly, the contentions of appellants are without merit, and the Act is clearly constitutional under this portion of the "primary effect" standard.

2. *The Act does not create a special class of beneficiaries, but merely equalizes benefits to children in public and non-public schools.*

The portion of Chapter 396 relating to the provision of textbooks to non-public school pupils is constitutionally indistinguishable from a similar Pennsylvania statute which was held constitutional in *Meek v. Pittenger*, 421 U.S. 349 (1975). In upholding the Pennsylvania law, this Court relied on its earlier decisions in *Board of Education v. Allen*, *supra*, and *Everson vs. Board of Education*, *supra*. More importantly, this Court in *Meek v. Pittenger*, reiterated its earlier statement in *Board of Education v. Allen* that the New York textbook law under consideration:

[M]erely makes available to all children the benefits of a general program to lend schoolbooks free of charge. Books are furnished at the request of the pupils and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.

Meek v. Pittenger, *supra*, 421 U.S. at 360, quoting *Board of Education v. Allen*, *supra*, 392 U.S. at 243-244.

Free textbooks have been mandated for Minnesota public school students since 1959. Minn. Stat. § 123.35, subd. 10 (1976). That policy was recently reemphasized by passage of the "Minnesota Public School Fee Law," Minn. Stat. §§ 120.71-120.76 (1976), which specifically prohibits local school boards from charging fees for textbooks. Thus, by making textbooks available to non-public school pupils, the Act merely bestows the benefits of Minnesota's longstanding policy of providing free textbooks to *all* Minnesota school children and is materially indistinguishable from the textbook loan programs approved in *Meek v. Pittenger* and *Board of Education v. Allen*.

The non-textbook portions of the Act authorize local school districts to loan or provide "instructional supplies" and "school library and audiovisual materials" to non-public school pupils. The Minnesota Public School Fee Law also prohibits local school districts from charging public school pupils fees for a substantial majority of these materials. Minn. Stat. § 120.74 subd. 1 (1976). Thus, the non-textbook and the textbook portions of the Act are closely analogous in that both merely make available to all children the benefits of a general program of free instructional materials.

Nevertheless, appellants contend that the Act does not satisfy the requirement of providing equal benefits because certain accounting practices had resulted in additional funds being placed into the formula used for determining the amount of aid available to each individual non-public student.⁷ In its decision, the District Court agreed in part with appellants' contentions and ordered the State of Minnesota to alter its accounting procedures to eliminate alleged unequal benefits.

⁷ Appellants' Jurisdictional Statement at 17-18.

In response to this order, the State of Minnesota, on February 7, 1977, served by mail upon appellants proposed changes to the accounting procedures which should eliminate the concerns expressed by the District Court. Therefore, appellants' concerns over unequal benefits should no longer exist. However, should appellants still have concerns over unequal benefits caused by accounting procedures, those concerns should be addressed in the first instance to the appellees and the District Court rather than to this Court.

Therefore, the contentions of appellants do not merit plenary consideration.

3. *Aid under the Act is restricted to the secular functions of Minnesota non-public schools.*

This Court has recognized that the processes of secular and religious training in sectarian schools are not so intertwined that secular textbooks furnished by the State to students attending sectarian schools are in fact instrumental in the teaching of religion. *Tilton v. Richardson, supra*, 403 U.S. at 681; *Lemon v. Kurtzman, supra*, 403 U.S. at 616-617; *Board of Education v. Allen, supra*, 392 U.S. at 248. The Minnesota Legislature, also aware of the interactions of secular and religious training in sectarian schools, carefully designed the Act so as not to aid the religious mission of any religiously-affiliated non-public school. Indeed, Chapter 396, section 2 defines "instructional materials" to include only:

... such secular, neutral and non-ideological instructional materials as are available and are of benefit to Minnesota public school students

All instructional materials, including textbooks, provided pursuant to Chapter 396 § 3 are "self-policing," in that if the

instructional materials initially qualify as being secular, non-ideological and neutral, they, being inanimate objects, will not become sectarian as they are used in the sectarian schools. As such, they are incapable of diversion to religious use. See *Meek v. Pittenger, supra*, 421 U.S. at 365.

Appellants, however, contend that there is insufficient policing of the Act by public officials to prevent the supplying of aid to the sectarian portion of the private schools.⁸ Such a contention is without support in law or fact.

Chapter 396 is administered in a manner identical to that upheld by this Court in *Board of Education v. Allen, supra*, a decision that was subsequently reaffirmed in *Meek v. Pittenger, supra*. As in the instant matter, the statutory scheme at issue in *Allen* did not require either placement on an approved list prior to the loan⁹ or state board approval, but only subsequent approval by a local board of education.¹⁰

Appellants further contend that the definition of textbooks under the Act permits a greater potential for diversion of textbooks to religious use than in the textbook loan program sustained in *Meek v. Pittenger, supra*.¹¹ However, a brief comparison of the pertinent statutory language clearly indicates that this contention is erroneous. In *Meek v. Pittenger*, "textbooks" were defined by the Pennsylvania statute as ". . . a principle source of study material for a given class" 421 U.S. at 354, n. 3 (emphasis added). In comparison, Chapter 396 § 2 subd. 1 specifically limits eligible textbooks to those ". . . available for the individual use of each pupil in such class or group . . ." which is clearly a tighter restriction than

⁸ Appellants' Jurisdictional Statement at 9-12.

⁹ See *Meek v. Pittenger, supra*, 421 U.S. at 361-362, n. 11.

¹⁰ *Board of Education v. Allen, supra*, 392 U.S. at 239, 255-256.

¹¹ Appellants' Jurisdictional Statement at 20.

that imposed by the statutes upheld in either *Meek v. Pittenger* or *Board of Education v. Allen*, *supra*. If a particular textbook is supplied to every student in a particular class and qualifies as an eligible "textbook" under the Act, then certainly that textbook would also qualify as "... a principle source of study material for a given class ..."

Appellants' contention that there is inadequate policing of the Act is also without foundation in fact. Appellants have failed to discuss the general administrative responsibilities of the State Department of Education as outlined in the Department's Rules and Regulations.¹² Further, appellants also ignore the fact that an employee of the State Department of Education visited a random sampling of non-public schools participating in the Act during the 1975-76 school year during which she inspected invoices at the local public school districts and examined materials provided by the public school districts to non-public school students.¹³ Moreover, that employee specifically verified that all textbooks which had been provided at the schools which were visited were "secular, neutral, and nonideological."¹⁴

Finally, it should be noted that appellants' assertions as to the alleged inadequate policing of the Act are apparently premised upon a questionnaire which purports to show that local public school districts are exercising inadequate control in reviewing and approving textbooks.¹⁵ However, appellees have disputed both the accuracy and the relevancy of the results of that questionnaire before the District Court on several

¹² Minn. Reg. EDU 742, A-2.

¹³ *Supra*, footnote 5, Affidavit of Rosemary A. Sommerville, dated September 24, 1976, paragraphs 3-5.

¹⁴ *Id.* at paragraphs 5(d) and 6.

¹⁵ A copy of the questionnaire is attached to an affidavit of appellants' attorney, William I. Kampf, dated September 21, 1976.

grounds.¹⁶ In summary, the Act as written and implemented has a primary effect that does not advance religion. The state aid provided pursuant to that Act: (1) is dispersed directly to non-public school pupils, instead of to the non-public schools themselves; (2) is dispersed to all pupils, both public and non-public, and is not directed to a specific class of non-public beneficiaries; and (3) is restricted to the secular portion of the non-public schools' functions. Therefore, the Act is part of a general program to provide certain secular benefits to all school children in the State and meets the "primary effect" test as enunciated by the United States Supreme Court in recent establishment clause cases.

D. The administration of the act fosters minimal entanglement between the state and religiously-affiliated non-public schools.

The final test in determining the constitutionality of Chapter 396 is to determine whether the Act and its administration involve excessive governmental entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). A close examination of the relationships between the State and sectarian schools created by the Act indicates that the potential and actual "entanglement" between the State and any religiously-affiliated schools whose students receive aid under the Act is, at most, very minimal.

The actual administration of the Act involves relatively few interactions between religiously-affiliated schools and the State, and nearly all interactions are of an insignificant ministerial nature. Initial application is made by the non-public

¹⁶ For a discussion at length of the inadequacies of appellants' questionnaire, see State Defendants' Reply Brief, October 15, 1976, at 6-9.

school pupil or his parent to the non-public school.¹⁷ Each non-public school then forwards a summarizing application to the local school district.¹⁸ Each non-public school maintains an inventory list of materials which is kept on file at the local school district.¹⁹ Each local school district may claim reimbursement from the State for actual expenses and administrative costs.²⁰

Materials for which reimbursement is allowed are carefully delineated in Chapter 396 § 2 subd. 1. The State therefore does not have to conduct an examination of the materials prior to authorizing reimbursement. To the extent that any examinations do occur by either the State or the local school districts, they do not result in excessive entanglement. *Board of Education v. Allen*, 392 U.S. 236 (1968).²¹

The textbook provisions of the Act are in every material respect identical to the textbook loan programs approved by this Court in *Meek v. Pittenger*, *supra*, and *Board of Education v. Allen*, *supra*, and therefore administration of the Minnesota program will involve no greater entanglement than that already approved by this Court.

Similarly, the term "instructional materials" is defined by the Act to include only those materials ". . . as are available and are of benefit to Minnesota public school students . . ." Chapter 396 § 2 subd. 1. Administratively, it is a simple matter to approve for reimbursement only those instructional materials currently in use in public schools, a system explicitly

¹⁷ Minn. Reg. EDU 743(a) at A-3.

¹⁸ *Id.* The State Department of Education determines the statistical allocation of aid; the local school district purchases the actual materials. Minn. Reg. EDU 743(b), and (c) at A-3.

¹⁹ Minn. Reg. EDU 743(d) at A-3.

²⁰ Minn. Reg. EDU 743(g) at A-4.

²¹ The statutory scheme approved in *Board of Education v. Allen* permitted approval by the State subsequent to the actual loan of textbooks. See discussion *supra* at 11.

approved in *Meek v. Pittenger*, *supra*, 421 U.S. at 361, and in *Board of Education v. Allen*, *supra*, 392 U.S. at 269-272 (Fortas, J., dissenting). Accordingly, the process of reimbursement requires no interference by the State at all in the religious affairs of the non-public schools.

In a recent decision, *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), this Court approved a statutory scheme which authorized direct monetary grants to institutions of higher learning in Maryland, including those with religious affiliations. There were no restrictions on the use of funds other than that they could not be used for "sectarian purposes." To ensure compliance, the State of Maryland, through its Council for Higher Education, required substantial documentation as to use of the funds and established regulatory procedures involving significant interactions between the state agency and the institution recipients.²² The administrative entanglement created by the Maryland statutory and regulatory scheme, which went as far as to authorize a possible audit of the institution, is far greater than any administrative entanglement either contemplated or realized under the Minnesota statute in question.

Based upon the actual circumstances underlying the administration of the Act and the pertinent legal authorities described above, it is clear that the two remaining arguments set forth by appellants with regard to entanglement are with-

²² Each institution's chief executive officer was required to submit affidavits of compliance with the law and descriptions of the specific uses for the funds both before and after the fiscal year in which the funds were expended. The institutions had to segregate the state funds into separate revenue accounts. The Maryland Council for Higher Education had final authority to determine what constituted a "sectarian purpose" and could audit the institution's books if needed. *Roemer v. Board of Public Works* 426 U.S. 736, 741-743 (1976).

out merit. First, appellants' contention that the "failure to articulate the nature of state sectarian school relations activates a presumption of entanglement"²³ is clearly without foundation in light of the minimal contact that the Act requires with non-public schools. Second, appellants further contend that a localized decision-making process magnifies administrative entanglement and political divisiveness.²⁴ However, there is nothing in the record to indicate that the sort of pressure that would lead to political divisiveness has occurred in any instance under the Act. Furthermore, the process for approving a textbook at the local level does not vary if the number of textbooks approved is increased. More importantly, however, it is difficult to perceive of any constitutional significance in the fact that the book must be approved by a local administrator rather than a statewide administrator.

In conclusion, appellants have failed to show any specific example of, or necessity for, excessive entanglement of the State into the affairs of religiously-affiliated schools. Any state involvement in the religious affairs of non-public schools resulting from administration of the Act is minimal at best and is within established constitutional limits.

E. Auxiliary aids and equipment.

Chapter 396 §§ 4 and 5, which would have provided equipment and auxiliary services to non-public students, have not been implemented at this time. Before those provisions may take effect, it would be necessary for the Department of Education to promulgate rules and regulations under the State Administrative Procedures Act. That process would require

²³ Appellants' Jurisdictional Statement at 15.

²⁴ *Id.* at 16.

at least 180 days from the time at which the rules were written and proposed for a hearing. For reasons of judicial economy, the District Court declined to rule on those two provisions of the State statute and also explained that "[b]ecause constitutional application may be possible, the Court cannot find them officially unconstitutional."²⁵ In addition, appellees promised the District Court that before either statutory provision were implemented appellants would be granted ample opportunity to seek judicial review.

The State of Minnesota has no intention of promulgating rules or regulations for either the loan of equipment or the provision of auxiliary services until such time as this Court renders a decision in *Wolman v. Essex*, case no. 76-496, which is presently pending before this Court. Therefore, plenary consideration of these provisions may either become unnecessary because of the decision in *Wolman v. Essex*, or at a minimum, should be reviewed by the District Court with regard to the specific regulations adopted by the Department of Education.

F. Summary.

Chapter 396 is a valid statutory program to correct a situation determined by the Minnesota Legislature to be inimical to the public welfare and legitimate means were chosen to accomplish the legislative goal. In light of this Court's prior decisions, no substantial federal question has been raised by this appeal and plenary consideration of this matter is unnecessary.

²⁵ Appellants' Jurisdictional Statement at A-5.

CONCLUSION

For the reasons set forth herein, this Court should grant appellees motion to dismiss this appeal, or, in the alternative, affirm the decision of the District Court.

Respectfully submitted,

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APPENDIX

CHAPTER THIRTY-SEVEN: EDU 740-759 INSTRUCTIONAL MATERIALS FOR PUPILS ATTENDING NONPUBLIC SCHOOLS (ALL NEW MATERIAL)

Edu 740 Policy

In order to promote equal educational opportunity for every school child in Minnesota and to assure all Minnesota pupils and their parents freedom of choice in education, the benefits provided by Minn. Laws 1975, Chapter 396 shall be made available to pupils in nonpublic schools as provided in this chapter.

Edu 741 Instructional Materials

(a) Eligible Instructional Materials.

(1) The term shall be limited to "textbooks," "school library and audiovisual materials," and "instructional supplies" as those terms or their equivalent are described or designated in the manual of instructions for uniform accounting for Minnesota school districts.

(aa) Textbooks include elementary and secondary textbooks furnished free to public school pupils including supplementary textbooks, and dictionaries. Textbooks are primarily for use in certain classes or grades rather than for general school use.

(bb) School library and audiovisual materials include materials such as school library books and pamphlets available for individual use by students; maps and globes for individual use; periodicals and newspapers for indi-

vidual use; audiovisual materials used in the instructional program such as films, filmstrips, recordings, exhibits, models, and television and radio teaching materials exclusive of equipment.

- (cc) Instructional supplies are consumable items such as tests, chalk, paper, test tubes, ink, pencils, paint, paint brushes, crayons, chemicals, shop supplies for vocational education, oils, cleaners, instructional farming supplies, supplies for the operation of equipment used in the teaching-learning process, workbooks, physical education supplies, printing of classroom materials, and magazines or periodicals for individual use.

- (2) Instructional materials must be secular, neutral, and nonideological such as the materials normally provided for pupils in public schools.

(b) Ineligible Instructional Materials.

Items such as unabridged dictionaries, encyclopedias, and other major reference works are classified as equipment and are therefore ineligible instructional materials.

Edu 742 General Administration

- (a) The department of education shall administer funds allocated for the purchase of instructional materials to be loaned or provided to nonpublic school pupils.
- (b) The department of education, in cooperation with the state auditor's office, shall establish proper accounting methods for fiscal control, fund accounting, and the

maintenance of records for the acquisition of instructional materials to be loaned or provided to nonpublic school pupils.

- (c) The department of education's administrative costs shall not exceed two percent of the state allocation for instructional materials to be loaned or provided to nonpublic school pupils.

Edu 743 Local Administration

- (a) An application for instructional materials to be loaned or provided shall be made by or on behalf of each participating nonpublic school pupil through the nonpublic school to the public school district in which the nonpublic school is located. For the 1975-76 year the application shall be made within 30 days of the effective date of these regulations. For the following school year it shall be made on or before September 15. The applications shall be on a form prescribed by the commissioner. Application forms shall be available in the office of the public school superintendent on the effective date of these regulations.
- (b) The department of education shall determine the allocation of aid for instructional materials.
- (c) The local school district shall purchase and transmit the instructional materials to the nonpublic schools in the district for distribution to the pupil applicants.
- (d) Instructional materials loaned to pupils in nonpublic schools shall be maintained on inventory by the local school district except in cases of consumable or non-reusable instructional materials.

- (e) The local school district may declare loaned school books unusable after five years and remove them from the inventory.
- (f) The nonpublic school shall maintain on file all applications for instructional materials loaned or provided to nonpublic school pupils. The applications shall be available for inspection by the department of education.
- (g) Upon completion of the distribution of the instructional materials each local school district may claim from the department of education (1) the cost of the instructional materials and (2) a sum for the actual cost of administration which shall not exceed five percent of the cost of the instructional materials distributed. The administrative costs shall be in addition to the allocation for the nonpublic school. Handling and shipping charges by the supplier shall be included in the allocation for each nonpublic school.

Edu 744 Availability of Funds

- (a) The allocation for instructional materials shall be the total expenditure for instructional materials by all public school districts in the state divided by the total number of pupil units based on an unduplicated count of pupils enrolled in the districts during the same fiscal year.
- (b) Kindergarten pupils shall be counted as one-half unit; elementary pupils (grades 1-6) shall be counted as one pupil unit and secondary pupils (grades 7-12) shall be counted as 1.4 pupil units notwithstanding the local nonpublic school organization.

- (c) For the 1975-76 school year, the allocation shall not exceed \$45.43 per nonpublic pupil unit. Future allocations will be based upon the most recent data available.
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